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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 244

LIVESAY WINDOW COMPANY, INC., *Petitioner,*

v.

LIVESAY INDUSTRIES, INC. and EVERETT G. LIVESAY WINDOW COMPANY, INC., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Livesay Window Company, Inc., respectfully prays that a writ of certiorari issue to review those portions of the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on February 27, 1953, reversing the judgment of the United States District Court for the Southern District of Florida which denied Respondents an accounting of damages, and affirming the judgment of said District Court which found Petitioner guilty of patent infringement.

OPINIONS OF THE COURT BELOW

No opinion was rendered by the District Court, and the judgment of the District Court (R. 529) is unreported. The opinion of the Court of Appeals (R. 604) is reported at 202 F. 2d 378.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1953 (R. 529). A Petition for Rehearing filed on March 20, 1953 (R. 614) was denied on June 29, 1953 (R. 623). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

I. Do the patent statutes (35 U. S. C. (1946 Ed.) § 70; now codified as 35 U. S. C. (1952 Ed.) § 284), make it mandatory for a court entering judgment for a patentee, to order an accounting for damages for the period from filing of suit to entry of judgment, even though the court finds such laches or equitable estoppel as would normally bar a recovery of damages but not an injunction?

II. Can a plaintiff whose patent is infringed by a defendant whose product is merely a non-inventive aggregation of old elements, invoke the doctrine of estoppel to preclude the defendant from asserting that the patent is invalid because it covers the nonpatentable aggregation?

STATUTES INVOLVED

§ 70 of Title 35 of the U. S. Code (1946 Ed.) (Revised Statutes § 4921) provides in part:

> "The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a judgment being rendered in any case for an infringement the

complainant *shall* be entitled to recover general damages which shall be due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor, together with such costs, and interest, as may be fixed by the court." (Emphasis supplied)

Section 283 of Title 35 of the U. S. Code (1952 Ed.) provides:

> "The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."

Section 284 of Title 35 of the U. S. Code (1952 Ed.) provides in part:

> "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court."

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This is a patent case in which the District Court enjoined further infringement of the patent (R. 530) but specifically found that there were laches on the part of the plaintiffs and denied any accounting or damages (Par. 9 and 11 of the Final Decree, R. 531).

The Court of Appeals, without overruling the District Court's Finding that there had been laches on the part of the plaintiffs, held that the District Court had erred in denying damages, at least from the time of the filing of the Complaint, which was some two years prior to the Final Judgment. (R. 608).

The Court of Appeals took the position that the statute which provided that upon judgment being rendered for infringement "the complainant shall be entitled to recover

general damages" (35 U. S. C. (1946 Ed.) § 70), and which was carried forward into the recent codification to provide that upon finding for the claimant "the court shall award the claimant damages" (35 U. S. C. (1952 Ed.) § 284), made it *mandatory* that the court grant an accounting for damages for all infringements by the defendant which occurred between the filing of the Complaint and the Final Judgment (R. 607-8).

The Court of Appeals said (R. 608)

> "Whatever, in the light of the record and in view of the prior relations of the parties, might have been said of the finding of laches and its application in this case if denial of damages had been limited to the time before defendant had been put upon positive notice that plaintiffs were claiming that its activities infringed, we do not determine, for the denial was not so limited. There can be no basis in law or in equity or under the statute, 35 U. S. C. § 70, however, for the holding and judgment made here, that the defendant, after notice was reasonably brought home to it, particularly by service in this suit, that plaintiffs were claiming that its activities infringed, could with impunity continue to pirate plaintiffs' invention and rob them of the protection of their patent."

This raises the first question presented.

The patent in suit, No. 2166870 (R. 581) shows a unitary, precast concrete window frame which has vertical metal channels imbedded therein to receive and guide little pins extending from the ends of Venetian blind slats to keep the blind from flapping in the wind. These vertical metal channels are incorporated in the frame and imbedded in the concrete thereof at the time the frame is cast. All of the parts, including the metal channel guides, are located with factory precision. The unitary structure can be made complete at the factory and can then be transported to, and installed in, a building as a prefabricated unit. It is not necessary to send a workman out to the job after the frame is installed to put in the blind guides where he could

not hope to match the accuracy of positioning and alignment which are obtainable at the factory. There is no waste of time. This is illustrated in Fig. 1.

Livesay Patent in Suit

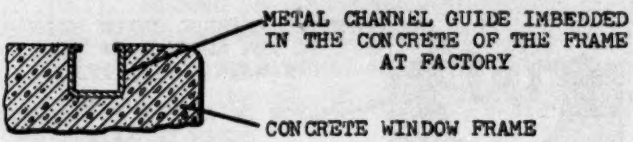

Fig. 1.

Every claim of the patent requires that the blind guide be "imbedded" in the frame (R. 586).

Livesay, the inventor, did not invent the metal channel guides. They were devised by others such as Weaver. (R. 490). Weaver's guides were not "imbedded" in the concrete. They were nailed on the surface of the frame after it was installed. They were then surrounded with a superficial plaster finish, as shown in the Weaver patent. This is illustrated in Fig. 2.

Prior Art Weaver Patent

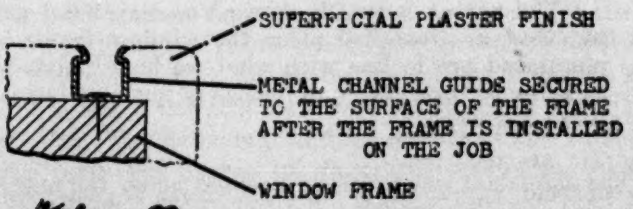
SUPERFICIAL PLASTER FINISH
METAL CHANNEL GUIDE SECURED TO THE SURFACE OF THE FRAME AFTER THE FRAME IS INSTALLED ON THE JOB
WINDOW FRAME

Fig. 2.

Sometimes, as shown in the prior Smith patent (R. 453), when the window was surrounded by concrete, anchors or pintles were cast into the concrete. The channel guides

were then secured on the surface of the concrete by screws or nails extending into the anchors or pintles. This is illustrated in Fig. 3.

PRIOR ART SMITH PATENT

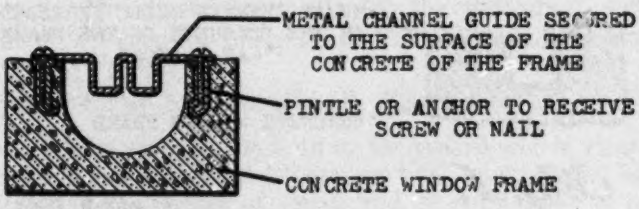
METAL CHANNEL GUIDE SECURED TO THE SURFACE OF THE CONCRETE OF THE FRAME
PINTLE OR ANCHOR TO RECEIVE SCREW OR NAIL
CONCRETE WINDOW FRAME

Fig. 3.

The application for the patent in suit was rejected in the Patent Office on the ground that it embodied a mere non-inventive aggregation of the old elements of Smith and Weaver (R. 588-90). The patentee overcame this objection by pointing out that he had a unitary structure with the metal channels located with factory precision which made it unnecessary to send a workman out to the job to install the guides. He said (Plaintiff's Exhibit 5, p. 67):

> "The patent to Smith shows Venetian blind guides but they are installed after the window frame is in place, and are in line with what we have pointed out as being the ordinary and inefficient mode of installing these members."

The defendant was formerly licensed under the patent in suit and manufactured the patented frame (R. 370, 408). When it did so, it imbedded the channels by casting them into the concrete at the time the frame was poured. While the license was in force, the defendant, as required by the license, joined the patentee in a suit on the patent against an infringer who imbedded the channel guides in the con-

crete or in a recess in the frame (R. 372). The patent was sustained. (*Livesay* v. *Drolet*, 38 Fed. Supp. 885).

Thereafter the license was terminated and defendant abandoned its practice of imbedding the metal channels by casting them in the concrete when the frame was poured (R. 50-1). Instead the defendant cast anchors or pintles into the frame as Smith had done and the channels were secured on the surface of the frame after the frame had been installed on the job (R. 58). This is illustrated in Fig. 4.

Defendant's Practice

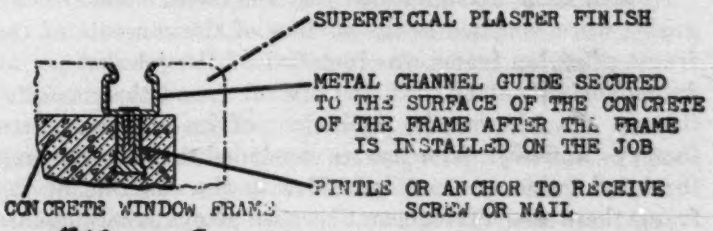
SUPERFICIAL PLASTER FINISH
METAL CHANNEL GUIDE SECURED TO THE SURFACE OF THE CONCRETE OF THE FRAME AFTER THE FRAME IS INSTALLED ON THE JOB
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Fig. 4.

In defendant's changed construction the guides performed the same function that they had performed in the prior art Weaver patent and the anchors or pintles performed the same function that they performed in the prior art Smith patent. There was no new and unexpected result. A workman had to go out on the job to install the guides and he could not attain the factory precision of the patent in suit. The defendant and its customers had to be satisfied with the degree of alignment attainable in Smith, Weaver and other prior art installations and had to put up with the added expense and inconvenience of on-the-job installation.

Some four years later, after laches had accrued (R.531), plaintiffs brought this suit. They claimed infringement by the changed construction.

Defendant answered that the patent is invalid because the claimed invention is not an invention but merely an aggregation. (R 22).

Plaintiffs countered with a Motion for Summary Judgment that the patent is valid (R. 36-8). This motion claimed estoppel to contest validity of the patent because of defendant's participation as co-plaintiff in the Drolet case. The District Court granted the Motion (R. 39).

The question of validity being thus summarily disposed of and isolated, the Master and the District Court turned to the question of infringement.

Although the Master found that the metal channel blind guides were fastened to the surface of the concrete of the frame after the frame was installed on the job and not at defendant's plant (R. 58), the Master found that installation on the job was the equivalent of installation in the factory (R. 64-5). The Master concluded that even though the blind guide was not imbedded in the concrete of the frame there was infringement because after the blind guide had been placed on the surface of the frame a superficial plaster finish was applied (R. 67).

The District Court confirmed these findings (R. 530) and the Court of Appeals affirmed (R. 612).

SPECIFICATIONS OF ERROR TO BE URGED

The United States Court of Appeals for the Fifth Circuit erred:

1. In holding that the patent statute, 35 U. S. C. (1946 Ed.) § 70, requires a court entering judgment for a patentee to order an accounting for damages for the period from filing of suit to entry of judgment, even though the court finds laches.

2. In reversing the portion of the judgment of the District Court denying an order for an accounting for damages for the period from filing of suit to entry of judgment on the ground that plaintiffs were guilty of laches.

3. In affirming the judgment of the District Court that defendant is estopped to assert that the patent in suit is invalid.

4. In failing to hold that the patent in suit is invalid because it covers the nonpatentable aggregation manufactured by defendant when the patent has been found to cover defendant's products.

REASONS FOR GRANTING THE WRIT

I.

In deciding that the patent statutes make it mandatory for the court to order an accounting for infringement from the date of filing of the Complaint to the date of Final Judgment, even though there are laches which would normally bar an accounting in an equity proceeding, the court below has interpreted an important portion of the patent statute in a manner which is in conflict with long established and extensively followed decisions of the other Courts of Appeals and in conflict with principles laid down by this Court in following generally recognized equitable doctrines. These portions of the patent law have not been, but should be, authoritatively interpreted by this Court.

Apparently the court below was of the opinion that the statute precluded the application of the general equitable doctrine of laches to patent cases so as to preclude all damages because the statute provided that the complainant "shall be entitled" to damages. This conclusion is inescapable because of the court's reference to its earlier decision in *Switzer Co.* v. *Centennial Liquor Store,* 186 Fed. 2d, 414, where the court, in reversing a lower court decision denying an accounting, in footnote 2, page 415, italicizes the words "shall be entitled".

The decision of the court below is in direct conflict with the decision of the Court of Appeals for the 2nd Circuit in *A. R. Mosler Co.* v. *Lurie,* 209 Fed. 364 (1913) which is a much cited leading case in which the court found for the patentee and granted an injunction but denied any account-

ing or recovery for infringement up to the date of Final Judgment. *

The decision is likewise in conflict with the general equitable principles announced by this Court in *McLean* v. *Fleming*, 96 U. S. 245, 24 L. Ed. 828 (1878) at pp. 831 and 833, where this Court granted an injunction against trade mark infringement but because of laches denied an accounting for the period up to final judgment; and in *Leggett* v. *Standard Oil Co.*, 149 U. S. 287, 37 L. Ed. 737 (1893) and *Lane and Bodley Co.* v. *Lock*, 150 U. S. 193, 37 L. Ed. 1049 (1893), where this Court carried the principles of the *McLean* case over into the patent law.

In *McLean* v. *Fleming* this Court said: (p. 831)

> "Equity courts will not, in general, refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits."

and at page 833 stated:

> "Cases frequently arise where a court of equity will refuse the prayer of the complainant for an account of gains and profits, on the ground of delay in asserting his rights, even when the facts proved render it proper to grant an injunction.
>
> "Relief of the kind is constantly refused, even where the right of the party to an injunction is acknowledged because of an infringement, as in case of acquiescence or want of fraudulent intent.
>
> "Acquiescence of long standing is proved in this case, and inexcusable laches in seeking redress, which

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* See Walker on Patents, Deller's Edition, Vol. 3, pg. 1920:

"The accounting may also be denied by reason of laches on the part of the plaintiff in bringing suit although the laches shown be not sufficient for a defense to the application for injunctive relief. (A. R. Mosler & Co. v. Lurie, 209 Fed. 364, C.C.A. 2 (1913); Marconi Wireless Telegraph Co., 213 Fed. 815, D.C., N.Y. (1914); Vacuum Cleaner Co. v. Innovation Electric Co., 234 Fed. 942 (D.C.N.Y. 1916); Pollitzer v. Foster, 59 F. (2d) 901, 903 (C.C.A. 6 1932)."

> show beyond all doubt that the complainant was not entitled to an account nor to a decree for gains or profits; but infringement having been proven, showing that the injunction was properly ordered."

The decision is also in conflict with the statement of this Court in *Root* v. *Lake Shore and Michigan Southern Railway Co.*, 105 U. S. 189, 26 L. Ed. 975 (1882) that the language of the patent statute merely granted equity courts the power to award damages, and with the express interpretation of this statute by the Court of Appeals for the Sixth Circuit in *Mills Novelty Co.* v. *Monarch Tool and Mfg. Co.*, 49 Fed. 2d 28 (1931) at page 30:

> "The right to an accounting of damages in equity is given by the statute in a permissive way. The court of equity will exercise its discretion in granting an accounting as well as in passing upon a preliminary injunction, and will consider all the respective equities of the parties."

This question is of importance in the administration of the patent laws in these days of crowded court calendars because a patentee who has been guilty of laches which would bar an accounting, could under the decision below toll the operation of the laches by merely filing suit and requiring the defendant who has an equitable right to continue alleged infringing manufacture to proceed at his peril, even though he might have to wait months or even years for a final adjudication.

The need for settling the question is pointed up by the statement of the Court of Appeals for the Eighth Circuit in *Middleton* v. *Wiley*, 195 Fed. 2d, 844, 847 (1952)

> "It is clear that, under the statute, recovery of compensatory damages for infringement of a patent is not a matter of judicial grace but of legal right, and that the damages awarded may not be less than a reasonable royalty."

The decision of the court below is believed to be erroneous in the light of the above cited decisions. To permit a patentee who has been guilty of laches and conduct resulting in a change of position on the part of the defendant to toll their operation by merely filing suit or notifying an infringer, is not consonant with general equity principles.

This differs materially from the situation which is contemplated in the patent statutes relating to patent marking (35 U. S. C. (1946 Ed.) §49; (1952 Ed.) §287, and should not be confused therewith. These sections of the patent statute provide that if a patentee does not put a patent notice on the product he cannot recover for infringement unless he gives actual notice. The filing of suit may be such notice. These provisions are provisions which protect the general public from hidden claims and are not provisions which alter general equitable principles applicable to patent litigation. They even make stricter requirements for the protection of the general public.

II

In holding that the defendant was estopped to contest the validity of the patent in suit, the court below rendered a decision which is in conflict with the principles announced by this Court relative to such personal estoppels. The decision of the court below reversed the trend against invoking such personal estoppels to keep them from depriving the members of the public of full opportunities to trade in unpatentable commodities.

The decision is contrary to the general principles set forth in *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U. S. 249, 90 L. Ed. 47 (1945), which was a case in which this Court held that a patentee who had assigned his patent was not estopped when sued by the assignee for infringement to show that the infringing product was that of an expired patent which could not be re-patented by anyone. This Court held that the doctrine of estoppel could not be

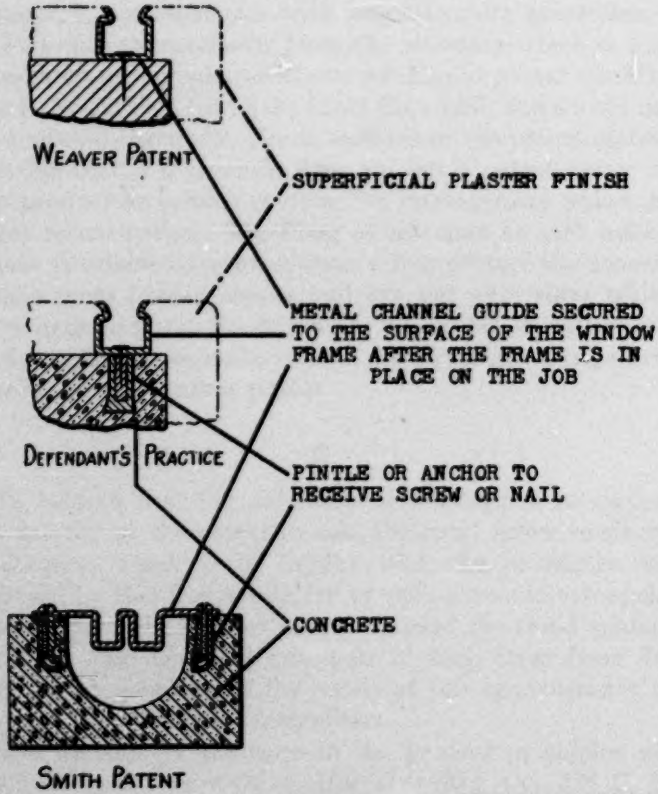
WEAVER PATENT
SUPERFICIAL PLASTER FINISH
METAL CHANNEL GUIDE SECURED TO THE SURFACE OF THE WINDOW FRAME AFTER THE FRAME IS IN PLACE ON THE JOB
DEFENDANT'S PRACTICE
PINTLE OR ANCHOR TO RECEIVE SCREW OR NAIL
CONCRETE
SMITH PATENT

Fig. 5.

applied to penalize the use of the unpatentable invention of an expired patent because the consuming public at large is entitled to receive the benefits of unrestricted exploitation by others of such unpatentable inventions.

The present case presents the question of whether a patent owner can avail himself of a private estoppel to keep the defendant from making a product which should be free from patent monopoly because it is a mere aggregation of old elements, each of which performs its old function without producing any new result.

The Master and both courts below found that the patent in suit is infringed by defendant's product. Yet, because the courts below held that defendant was estopped to question the validity of the patent, the defendant could not plead and show that the patent which covered him and read on his product was merely for a noninventive aggregation of old elements, and thus was a patent which subtracted from former resources freely available to skilled artisans. *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 152; 95 L. Ed. 162, 167 (1950)

That defendant's product, which came within the scope of the patent in suit, is an aggregation of old elements each performing its old function, is clear. The window frame performs its old function. The metal channel blind guide, which is affixed to the surface of the frame, performs the same function that it performed in Weaver, where it was fastened on the surface in the same way after the window frame had been installed in the building. The pintles or anchors which receive the nail or screw perform the same function that they perform in Smith where they were imbedded in the concrete of the frame to receive the screw to hold the metal channel on the concrete of the frame after the frame was in place in the building. Even the superficial plaster finish performs the same function that it performed in Weaver.

This is shown graphically in Fig. 5, which shows Weaver, Smith and defendant's practice.

The decision of the court below is erroneous. The defendant's product does not incorporate anything inventive. The window frame is installed in a window opening. Thereafter the metal channel guides are placed on the frame. They are fastened by nails which extend into the anchors or pintles. They do not incorporate factory precision. The frames perform their old function, the channels perform their old function and the pintles or anchors perform their old function.

It is clear from the *A&P* case that such an old aggregation is not patentable. It is just as much a part of the resources available to the public as is the invention of an expired patent, and the policy of the patent laws is to see that no one is given a monopoly to prevent the public from using or having the advantage of having others use such unpatentable subject-matter.

In the *Scott Paper Company* case, this Court refused to be tied up with logical refinements. It cut through to the basic principle that under the patent laws the consuming public is entitled to receive the benefit of unrestricted exploitation of unpatentable subject-matter and found private estoppels cannot be invoked to impair this paramount public interest. See also *Paramount Publix Corp.* v. *American Tri-Ergon Corp.* 294 U. S. 464, 477; 79 L. Ed. 997, 1004 (1935).

The courts below have found that the claims of the patent in suit are broad enough to cover an unpatentable aggregation, namely, defendant's product. The way to preserve the public interest in unrestricted competition in this unpatentable product is to cut through logical refinements which the doctrine of estoppel presents. If the patent is that broad, and the courts below have so found, it is invalid. The courts have a duty in the paramount public interest to free the public from invalid patent monopolies which restrict free competition in unpatentable products, and private estoppels by conduct cannot relieve the courts from this duty. In *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394, 400-1; 91 L. Ed. 374, 379 (1947), the court said:

> "• • • In thus emphasizing the necessity of protecting our competitive economy by keeping open the way for interested persons to challenge the validity of patents which might be shown to be invalid, the Court was but stating an often expressed policy that 'It is the public interest which is dominant in the patent system. Mercoid Corp. v. Mid-Continent Invest. Co. 320 U. S. 661, 665, 88 L. Ed. 376, 380, 64 S. Ct. 268, and that the right to challenge 'is not only a private right to the individual, but it is founded on the public policy which is promoted by his making the defence, and contravened by his refusal to make it.' Pope Mfg. v. Gormully, 144 U. S. 224, 235, 36 L. Ed. 414, 418, 12 S. Ct. 632."

Incidentally, the defendant is not taking a position inconsistent with its former position when it was a licensee and obtained a decision that the patent in suit is valid. The defendant there was making a frame with the blind guides imbedded therein at the factory with factory precision. The defendant did not prevail upon the court in the *Drolet* case to hold that the patent was broad enough to cover the practice where the blind guides are installed on the job without factory precision and without imbedment in the concrete of the frame. Now, the defendant is making a product in which the guides are not embedded and are not installed at the factory.

The court below held that the defendant was estopped because it had assisted in procuring the patent and in getting the court to sustain it in the *Drolet* case and because it had accepted the benefits of the judgment, so that the taking of the present position would amount to trifling with the judicial processes.

This Court has recognized, however, that the dominant public interest in free enterprise overrides such private estoppels. The fact that a defendant had sought a patent on the same products was overridden by this public interest in *Haughey* v. *Lee*, 151 U. S. 282; 38 L. Ed. 162 and *Paramount Publix Corp* v. *Tri-Ergon Corp., supra.*

The Scott paper case goes even further.

In *Mercoid Corp.* v. *Mid-Continent Investment Co.* 320 U. S. 661; 88 L. Ed. 376, this Court permitted a licensee to attack the validity of the patent where the license agreement contained provisions extending the monopoly of the patent to unpatentable materials because of the dominant public interest in protection from invalid restraints, stating: (Pg. 381)

> "• • • It is the public interest which is dominant in the patent system. • • • It is the protection of the public in a system of free enterprise which alike nullifies a patent where any part of it is invalid (• • •) and denies to the patentee after issuance the power to use it in such a way as to acquire a monopoly which is not plainly within the terms of the grant."

Furthermore, the defendant's and the patentee's position in the Patent Office was that the present practice is an aggregation.

The suggestion that defendant is estopped because it received the benefit of the prior holding of validity and infringement is without merit. In the first place, the defendant never used the patent to enjoin the making of an unpatentable aggregation. It never had the alleged "benefit" which the patentee seeks now.

Futhermore, it is well-recognized that when a licensee has terminated the license he has terminated the benefits thereof and can contest validity of the patent even though he has been a party to litigation.

In the case of *Paine* and *Williams Co.* v. *Baldwin Rubber Co.*, 113 F. 2d 840 (C.A. 6, 1940) the patentee had sued the licensee for an accounting and recovered. Subsequently the licensee terminated the agreement and manufactured an article which the plaintiff contended was substantially identical to those previously held to infringe and by virtue of the previous decision, that the defendant was estopped to attack the validity of the patent. The Court

of Appeals held that the defendant was not estopped in the subsequent litigation to contest validity.

The shoe should be on the other foot. In this case the patentee argued before the Patent Office that the invention was patentable because it differed from the defendant's present practice of installing the guides on the job without factory precision. The patentee argued that Smith and Weaver differed from the patent in suit because they installed the guides on the job, just as defendant does. The patentee should now be estopped to enforce his patent to prevent what he conceded was unpatentable. He should not be permitted to invoke an estoppel to prevent the defendant from invoking an estoppel against him.

The net effect of the decision of the court below is to deprive the public of its paramount right to free competition and to deprive the public of its right to purchase the unpatentable aggregation anywhere. The defendant is no longer available as a source. Furthermore, the public is faced with an undisturbed patent monopoly on an unpatentable product which will subject them to harassment and suppression, if they try to make use of these resources which should be freely available to them, and would be, if this patent were held invalid in this case.

As a matter of fact, if the Petitioner were permitted to challenge the validity of the patent in suit, it could show not only that the claims are invalid because they cover an unpatentable aggregation, but that the sole feature found by the Patent Office to support patentability, namely, the embedding of the channel members in the concrete of the frame at the time the frame is poured, is clearly disclosed in the prior Hilt patent (R. 475-9), which was not before the Patent Office or the District Court in the *Drolet* suit. The public interest in patent cases is paramount. This public interest is not served by permitting the public to be harassed by a clearly invalid patent because of a technical defence of estoppel.

Apparently, the manufacture and use of structures charged to infringe the patent in suit is confined to the State of Florida, so that litigation of this patent in other circuits, resulting in a conflict of decisions, is not likely to occur.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1953

No. 244

LIVESAY WINDOW COMPANY, INC.,

Petitioner,

v.

LIVESAY INDUSTRIES, INC., and EVERETT G. LIVESAY WINDOW COMPANY, INC.,

Respondents.

BRIEF OF RESPONDENTS AND MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The statement of the case by the Petitioner not only failed to properly state the same in order that the Court might find from such statement that the questions presented by the petition did arise, but also stated matters therein which the record does not disclose as is hereinafter set forth. For this reason the Respondents will give their own statement of the case, and will point out to the Court wherein the statement of the Petitioner is erroneous.

The Petition for Writ of Certiorari seeks to review the opinion of the Court of Appeals for the Fifth Circuit written by Chief Judge Hutcheson, Livesay Industries, Inc., et al v. Livesay Window Company, Inc., 202 F. 2d. 378. The opinion clearly states the facts. (Record pp. 604-607). The writer of this brief cannot improve on such statement, but will attempt to set forth these facts concisely.

Briefly, the facts as so stated in said opinion were that the District Court of Miami, Florida, had enjoined the Petitioner from further infringement of a patent, and had denied the Respondents any damages under the Federal statute on the ground of laches. The same District Court held that the Petitioner was estopped to question the validity of the patent because of its conduct through its counsel, who is also counsel in this case. Said counsel in the Patent Office assisted in obtaining the patent which Petitioner thereafter became a licensee of. While Petitioner was such licensee said counsel on behalf of Petitioner successfully maintained a suit to enjoin the infringement of said patent, the same being Livesay v. Drolet, 38 F. Sup. 885. The Petitioner thereby eliminated competition, and continued as licensee of said patent. Thereafter, the license agreement was cancelled for non-payment of royalties by the Petitioner, and thus arose the suit at bar.

The said District Court also held that the law and facts as found in Livesay v. Drolet, supra, were res adjudicata as to the Petitioner. In said cause of Livesay v. Drolet, the District Court found the patent involved in this case to be valid and infringed, and issued an injunction in behalf of the Petitioner, as aforesaid. The said

District Court also found that the Petitioner by accepting the benefits from the said case of Livesay v. Drolet, in eliminating competition by injunction, was estopped to question the validity of the patent.

The Court of Appeals for the Fifth Circuit reversed the said District Court because of its order denying damages to the Respondents, holding there was no evidence of laches to support the finding.

The statement contained in the petition on Page 3 thereof to the effect that the said Court of Appeals did not overrule the District Court's finding as to laches, is not a true statement according to the record. The District Court in the final decree denied any damages on the ground of laches (Record - p. 531, par. 11). Chief Judge Hutcheson in his opinion reversing this finding used the following language:

> "We agree with plaintiffs that, in denying plaintiffs damages and in denying their motion to amend their pleadings and refer the matter of accounting and damages to the master, the court's decree is without support in the evidence and that it finds no support in the adjudicated cases."
>
> (Page 380 of Opinion and Pages 607-608 of Record)

ALLEGED QUESTIONS RAISED BY PETITIONER

The first question stated by the Petitioner in its petition is as follows:

"1. Do the patent statutes (35 U.S.C. [1946 Ed.] § 70; now codified as 35 U.S.C. [1952 Ed.] § 284), make it mandatory for a court entering judgment for a patentee, to order an accounting for damages for the period from filing of suit to entry of judgment, even though the court finds such laches or equitable estoppel as would normally bar a recovery of damages but not an injunction?"

(Page 2 of Petition)

This question on its face assumes that the Court of Appeals for the Fifth Circuit found certain facts or law which were not in truth and fact found by said Court of Appeals.

First, this question assumes that the Court of Appeals did not reverse the District Court in its finding of laches as to damages, a matter of fact, and, second, it assumes there was a finding of equitable estoppel barring damages by either the District Court or the Court of Appeals.

The Respondents have shown above by quoting from the opinion of Chief Judge Hutcheson that the District Court was reversed for denying damages on the ground of laches because there was no evidence from which the Court could have found the same, and there is nothing in the record at all as to any finding by either the District Court or the Court of Appeals concerning equitable estoppel barring damages.

Let us quote Chief Judge Hutcheson further in what

he said in his opinion as to the action of the District Judge in denying damages on the ground of laches. It is as follows:

> "Here plaintiff's on their appeal, vigorously contest the finding and judgment of the court that they have been guilty of laches in asserting their claim and, therefore, may not recover any damages for the infringement found.
>
> Pointing out: that these findings are directly contrary to the findings of the master who heard all the witnesses in person; and insisting that they are without any substantial evidence to support them; appellants urge upon us that in denying recovery, after notice of their intention to sue was brought home to defendant and certainly after service in the suit, they are contrary to all equitable principles as established by the decided cases and to the statute authorizing damages for infringement.
>
> We agree with plaintiffs that, in denying plaintiffs damages and in denying their motion to amend their pleadings and refer the matter of accounting and damages to the master, the court's decree is without support in the evidence and that it finds no support in the adjudicated cases."

(202 F. 2d. 380 — Record pp. 607-608).

So, it is clear to be seen that the Court of Appeals for the Fifth Circuit Found that there was no evidence

to support any finding of laches by the District Judge. The Petitioner would have this Court review the evidence on laches, purely a matter of fact.

This Question No. 1 was attempted to be raised by the Petitioner by its Assignment of Error No. 1, (Page 8 of Petition) that the Court erred, as follows:

> "1. In holding that the patent statute, 35 U.S.C. (1946 Ed.) § 70, requires a court entering judgment for a patentee to order an accounting for damages for the period from filing of suit to entry of judgment, even though the court finds laches."

This assignment of error makes the same false assumption as to laches as was made in the first question presented. Like the said question, it assumes that the said Court of Appeals did find laches, whereas in truth and in fact the said Court of Appeals found that there was no evidence from which laches could be found. This specification of error should fall and be disregarded for this reason.

The Second question presented by the Petitioner (Page 2 of Petition) is as follows:

> "II. Can a plaintiff whose patent is infringed by a defendant whose product is merely a non-inventive aggregation of old elements, invoke the doctrine of estoppel to preclude the defendants from asserting that the patent is invalid because it covers the nonpatentable aggregation?"

In the first place no assignment of error raised this question. Both of the assignments of error of the petitioner are based upon the ruling of the Court of Appeals concerning laches in connection with damages. For this reason this question should not even be considered at all.

Furthermore, this second question assumes, first, that the product patented is a non-inventive aggregation of old elements, and, second, that said product is non-patentable. Both the District Court and the Court of Appeals held that the Petitioner could not question the validity of this patent because of its conduct which estopped it so to do, and also because of a decision in a Federal case to which it was a party which was not only res adjudicata as to the Petitioner, but which acted itself as an estoppel against the Petitioner, because the Petitioner had accepted valuable benefits from such a decision. Let us see what Chief Judge Hutcheson says in this regard in his opinion.

> "For the reasons and upon the authorities hereinafter briefly set forth, we are of the clear opinion that, under the undisputed facts, as to its part in obtaining the patent and as co-party plaintiff in instituting and prosecuting the Livesay-Drolet suit, defendant is concluded from contesting the binding force of the judgment as to matters determined in it, as well of fact as of law, and, therefore, from contesting the validity of the patent."

(202 F. 2d. 381-382 — Record Pages 609-610).

In the notes made a part of the last quotation, the facts are fully set out and law is cited.

Chief Judge Hutcheson in this opinion further says:

"Our position that the judgment estops the defendant on that issue is further supported by the authorities holding that where one in whose favor a judgment is rendered accepts the benefits, he is estopped from questioning the validity, of the judgment in any subsequent litigation.

Further, all questions of reported cases aside, it ought to be, we think it is, clear that, upon every principle of judicial estoppel, including the estoppel arising out of inconsistent positions in legal proceedings, defendant may not, as it attempts to do here, so trifle with the judicial process.

By solemn affirmation in the patent office and thereafter by solemn affirmation in its pleadings prepared and filed by the same counsel who represents it in this suit, it affirmed the patentability of the invention and the validity of the patent. By evidence offered and argument made by the same counsel in support of that affirmation, it induced the district judge, upon full and careful consideration, as evidenced by his opinion in Livesay v. Drolet, D. C., 38 F. Supp. 885, to hold the patent valid and infringed. During the pendency, and upon the strength of the suit and afterwards upon the strength of the judgment in it, it continued to operate as a licensee. Defendant ought to be, we think it is, completely estopped from doing an about face in this case in the same court and forum and repudiating what it had before as solemnly affirmed there."

(Pages 382-383 of Report, and Pages 611-612 of Record)

Chief Judge Hutcheson cites many authorities to uphold this position.

Thus, we see that in connection with this second question not only has the petitioner failed to set forth an assignment of error thereon, but also there is nothing in the record from which an assignment of error could be drawn, inasmuch as neither Court made any finding to the effect that the product patented was a non-patentable product.

LEGAL INSUFFICIENCY OF SPECIFICATIONS OF ERROR BY PETITIONER

Assignment of Error No. 1 of the Petitioner (Page 8 of Petition) has been quoted in this brief hereinabove and it contains a statement that the Court had found laches. As shown hereinabove, the Court of Appeals actually found that there was no evidence from which the District Court could have found laches, and reversed the District Court for finding laches. This makes this assignment of error legally insufficient.

Assignment of Error No. 2 (Page 8 of Petition) was that the Court erred, as follows:

> "2. In reversing the portion of the judgment of the District Court denying an order for an accounting for damages for the period from filing of suit to entry of judgment on the ground that plaintiffs were guilty of laches."

This assignment of error did raise a question decided by the Court of Appeals, for the District Court was reversed for denying damages because of laches. This second assignment of error is in direct contravention of the first assignment of error, for in the first assignment of error it is stated that the Court of Appeals found laches, and in the second assignment of error it is stated that the Court of Appeals reversed the District Court for denying damages on the ground of laches. The first assignment of error is not true, and no question is presented or argued under this second assignment of error. The question of laches is a matter of fact, and the Court of Appeals held that there was no evidence from which the District Court could have found laches. Certainly, certiorari will not lie to review a finding of fact.

ASSERTED REASONS OF PETITIONER WHY PETITION SHOULD BE GRANTED

The Respondents have shown that the questions presented by the Petitioner do not contain true statements, and that even though they did, they are not the questions involved and decided by the Court of Appeals. The Respondents have further shown legal insufficiency of the assignment of errors of the Petitioner. The reason of Petitioner set forth in its brief for granting the petition is based on the questions presented and said assignment of errors, and it necessarily follows that such reason is not legally sound.

The Petitioner gives as its reason that the petition should be granted (Page 9 of Petition), that the Court of Appeals interpreted a Federal statute in a manner which is in conflict with decisions of other Courts of

Appeal and with decisions of this Court. The petition alleges that the Court of Appeals decided that damages must be assessed from the filing of the suit under the Federal statute "even though there are laches which would normally bar an accounting". (Page 9 of Petition). As shown above, the Court of Appeals held that there was no evidence from which the District Court could have found laches, and reversed the District Court for so doing, and so the reason for allowing the writ and granting the petition completely falls, as being based on a false premise.

Even though the reason were true, the decision of Chief Judge Hutcheson is not in conflict with that of any other circuit. The statute under consideration was passed in 1946, and did away completely with any accounting for profits which existed under previous statutes. The statute in question only allows general damages, not less than a reasonable royalty, and placed a limitation of six (6) years on such damages. It is very easy to see that there could be laches barring an accounting for profits which would in nowise bar a suit for damages. All of the cases cited by the Petitioner as being in conflict with the opinion of Chief Judge Hutcheson were dated prior to the Year 1946. As is shown on Pages 9 to 11, inclusive, of said petition, the cited cases are dated 1913, 1878, 1893, 1893, 1914, 1916, 1932, 1882, and 1931, respectively. All of these cited cases are not only not in point, but concern an entirely different statute.

Then appears in the petition (Page 11 of Petition) a citation which from the Petitioner's standpoint is indeed disastrous to its contention. This gives the case of Middleton v. Wiley, 195 Fed. 2d, 844. This case was cited

and quoted from in the petition. In this case the District Court granted the injunction and gave nominal damages. The Court of Appeals reversed it holding the appellant entitled as a matter of right to damages. The Petitioner argues that the opinion of Chief Judge Hutcheson held the statute to be mandatory as to assessment of damages during a certain period, and this was in conflict with decisions of other Circuits; yet, the Petitioner cites this case which expressly holds said statute to be mandatory in connection with the assessment of damages. The opinion in this case is a very late case and is the only one cited by the Petititoner which concerns the statute affected.

Even the District Court in the case at bar recognized the statute to be mandatory as to assessment of damages in the absence of laches. Its refusal to allow damages was based on the finding that there were laches. The Court of Appeals reversed this finding on the ground that there was no evidence to support it.

The writer of this brief could not possibly state the questions of law and fact involved in this case as well as they were stated by Chief Judge Hutcheson in his opinion. Voluminous authority is cited upon each question of law, most of which are recent cases. There are decisions cited in said opinion from many Circuits, as well as from this Court. Even a casual reading of the said opinion could not help but impress upon the reader the care and thought with which the same was written, as well as the logic of the reasoning, and the conclusions reached in it.

ARGUMENT

The Respondents adopt as their brief the law and facts as laid down in the said opinion of Chief Judge Hutcheson. (Record — 604-612).

CONCLUSION

The questions presented and the assignments of error of the Petitioner are not legally sufficient, as has been shown hereinabove. The one reason stated in the petition for the granting of the same is based upon a false premise that the Court of Appeals found there were laches when, as a matter of fact, said Court reversed the District Court for so doing and held that there was no evidence to support the finding of laches. The one reason stated in the petition for the granting of the same is not supported by the citation of any authority which concerns the present statute involved in this case. The petition itself cites and quotes from one authority holding directly contrary to its asserted reason for granting the petition, and this is the only citation of the Petitioner involving the 1946 Patent statute. It is obvious that the Petitioner seeks a review by the Supreme Court of the United States upon a finding of fact. The Court of Appeals found that there was no evidence from which the District Judge could have found laches. This is what the Petitioner would have this Court review. The petition is a frivolous one and should be denied, and for this reason a motion to dismiss the same is made a part of this brief.

MOTION TO DISMISS PETITION

The Respondents respectfully move the Court to dismiss the Petition for Writ of Certiorari involved in this case on the ground that both the questions presented by the petition and the specification of errors set forth therein are legally insufficient to raise any question adjudicated by the Court of Appeals for the Fifth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 244

LIVERAY WINDOW COMPANY, INC., *Petitioner*,

v.

LIVERAY INDUSTRIES, INC. AND EVERETT G. LIVERAY WINDOW COMPANY, INC., *Respondents*.

PETITIONER'S REPLY BRIEF

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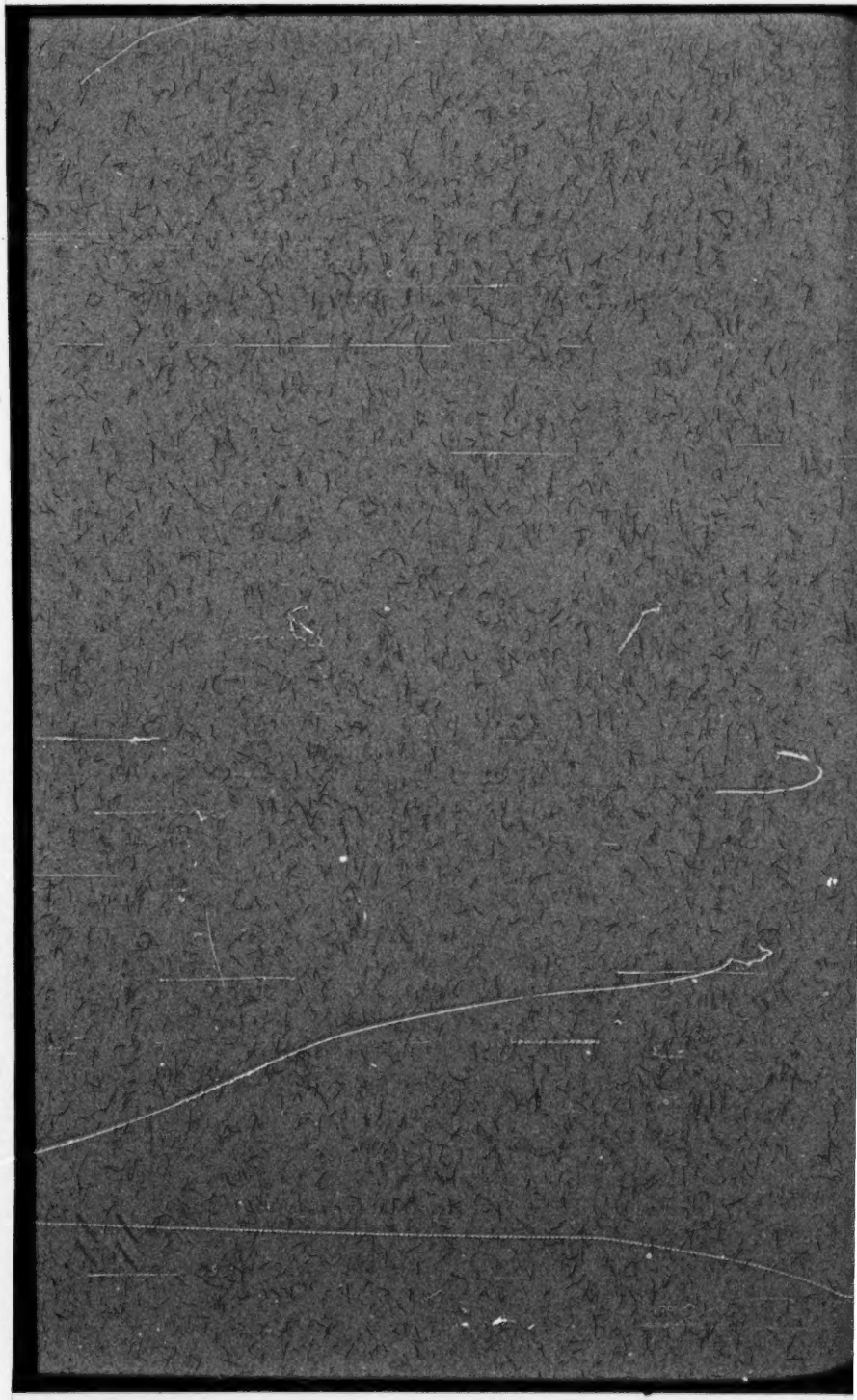

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PETITIONER'S REPLY BRIEF

Respondents' brief opposes the grant of the Writ on the grounds that the Questions Presented are not present in this case and that the reasons urged by Petitioner for granting the Writ are based on a false interpretation of the decision of the Court of Appeals and are not supported by any decision in conflict with that decision. Respondents are clearly in error.

On the first question presented in the Petition, and the Specifications of Error Nos. 1 and 2 regarding this question, Respondents' principal position is that the Court of Appeals *reversed* the District Court's finding that Respondents were guilty of laches, quoting at two points (Respond-

ents' Brief, pp. 3 and 5) the first sentence only of the last paragraph commencing on Record page 607.

For the convenience of the Court, the entire paragraph in question is here quoted (R. 607-8).

> "We agree with plaintiffs that, in denying their motion to amend their pleadings and refer the matter of accounting and damages to the master, the court's decree is without support in the evidence and that it finds no support in the adjudicated cases. *Whatever, in the light of the record and in view of the prior relations of the parties, might have been said of the finding of laches and its application in this case if denial of damages had been limited to the time before defendant had been put upon positive notice that plaintiffs were claiming that its activities infringed, we do not determine, for the denial was not so limited.* There can be no basis in law or in equity or under the statute, 35 U.S.C., Sec. 70, however, for the holding and judgment made here, that the defendant, after notice was reasonably brought home to it, particularly by service in this suit, that plaintiffs were claiming that its activities infringed, could with impunity continue to pirate plaintiff's invention and rob them of the protection of their patent." (Emphasis supplied)

Respondents contend that the first sentence of this paragraph constitutes a reversal of the District Court's *finding of laches* because of absence of evidence on this issue. In point of fact, the Court of Appeals in that statement merely held that there was no evidence or authority to support the Court's decree denying damages for the period following notice of claim of infringement, irrespective of whether there were laches or not. A reading of the entire paragraph in context renders the actual determination of the Court of Appeals clear. In the next sentence following that quoted by Respondents, which Petitioner has italicized, the Court of Appeals removed all conjecture regarding the effect of the preceding sentence on the finding of laches by expressly denying any determination regarding the "finding of laches". Petitioner's statement in connection with the first

question presented that the Court of Appeals did not reverse the finding of laches is, therefore, an accurate one.

Respondents urge only one further reason for denying the Petition in regard to the first question presented. Respondents contend that since the statute in question, 35 U. S. C., Sec. 70, was amended in 1946 to make the basis of recovery in patent infringement suits general damages only, rather than damages in addition to profits, the nine cases cited by Petitioner on pages 9-11, inclusive, of the Petition are not in conflict with the decision of the Court of Appeals in this case as they were rendered prior to the enactment of this amendment. The decision of the Court of Appeals for the 8th Circuit, *Middleton* v. *Wiley*, 195 F. (2) 844, referred to by Respondents in this connection was cited in the Petition only for the purpose of showing the need for review and settlement of the first question presented since this decision is also in conflict with those cited at pp. 9-11 of the Petition.

The Statute in question has its derivation in Section 55 of the Consolidated Patent Act of 1870, 16 Stat. 198, and the particular language regarding the recovery of damages in addition to profits persisted without change in any material respect from the date of that statute until the amendment in 1946 removing the language regarding recovery of profits. Obviously the 1946 amendment does not remove the direct conflict existing between the decision below and those cited by Petitioner.

In connection with the second question presented by Petitioner, Respondents assert that no assignment of error raised this question and that no Court below determined that the *product patented* is a noninventive aggregation of old elements and therefore is unpatentable. Respondents' positions on this question are pointless and are not responsive to the reasons asserted in the Petition.

Petitioner's Specifications of Error Nos. 3 and 4 on page 9 of the Petition, are directed to this question.

Further, the second question presented and the assignments of error relating thereto do not refer to the nonpat-

entability of the *product patented* (Respondents' product). The second question presented in the Petition is whether a patentee can avail himself of a private estoppel to prevent a *defendant* (Petitioner) from showing that *defendant's* (*Petitioner's*) *product* is a noninventive aggregation of old elements, when defendant's product has been found to infringe the patent. The only findings necessary to raise this question are that the defendant's product has been found to infringe the patent and that defendant has been held to be estopped to question patent validity and thereby show that its product which is covered by the patent is an aggregation. Both these findings were made in this case (R. 530 and R. 39). Respondents have not seen fit to address themselves to Petitioner's contention that the lower court's decision on this question is in conflict with the several decisions of this Court set out at pages 12-16 of the Petition, but restrict their argument to the pointless contention that their product has not been found to be an aggregation, whereas it is the Petitioner's product which is the subject of this controversy.

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